UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FORWARD INDUSTRIES, INC.,

Plaintiff,

-against-

TERENCE BERNARD WISE and
JENNY P. YU,

Defendants.

No. 14 Civ. 5365 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiff Forward Industries, Inc. ("Forward" or the "Company"), by its attorneys Olshan Frome Wolosky LLP, respectfully submits this memorandum of law in support of Forward's motion for: (i) preliminary injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure; and (ii) limited expedited discovery.

Preliminary Statement

Forward seeks immediate injunctive relief, in advance of its annual shareholder meeting, to prevent the recurrence of ongoing, intentional violations of the federal securities laws in connection with Defendants' campaign to solicit proxies for the meeting. Specifically, Forward seeks an order of this Court enjoining the Defendants from: (1) directly or indirectly violating Sections 13(d) and 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and the rules promulgated thereunder; (2) acquiring any additional shares of Forward common stock unless they have made adequate corrective disclosures as required by the Exchange Act; (3) soliciting any proxies or voting any proxies received unless they have made adequate corrective disclosures as required by the Exchange Act, and unless they have complied with the Company's Bylaws with respect to the nomination process; and (4) engaging in any actions or activities that are prohibited to any person or party who has been deemed an "interested shareholder" under New York Business Corporation Law Section 912. Plaintiff also seeks limited, expedited, discovery.

Statement of Facts

The facts set forth below are based upon the Verified Complaint, dated July 16, 2014, and upon the Declaration of Jeffrey A. Udell, together with its exhibits, and the Declaration of Owen P.J King, each sworn to on July 30, 2014 and filed herewith. Forward intends to offer further evidence in support of its Motion through discovery obtained from Defendants.

A. The Parties

Plaintiff Forward is a corporation organized under the laws of the State of New York, with its principal place of business in West Palm Beach, Florida. Forward designs, markets and distributes, primarily for hand held electronic devices, "carry and protective solutions" including soft-sided carrying cases, bags, protective plates and other accessories. (Compl. ¶ 13.)

Defendant Terence Bernard Wise is a citizen and resident of London, England. He is the sole owner of Forward Industries Asia-Pacific Corporation ("Forward China"), a British Virgin Islands registered corporation that is the exclusive sourcing agent for Forward. Since February 2012, Wise has been a director of Forward. (*Id.* ¶ 14.)

Defendant Jenny P. Yu is a citizen of Taiwan who resides in West Hollywood, California. She has been a business associate and partner of Wise for many years, has participated with him in many ventures in various capacities and has had several pooled investments together with Wise. (Compl. ¶ 24.) As one example, Yu served from 1995 through 2004 as a director of Justwise Group Limited, an entity founded by Wise of which he serves as Principal and Chairman. (Udell Decl. ¶ 18 and Exs. 17 & 8.) Yu has been at all relevant times Managing Director of Wise's company, Forward China. At Wise's request, Yu personally attended meetings of the Forward Board of Directors as an invited guest between February 2012 and February 2013. (Compl. ¶ 15.)

B. Forward's Business

Forward's principal customer market is original equipment manufacturers that either package Forward's products as accessories or sell them through their retail distribution channels. (Compl. ¶ 16.) In March 2012, Forward entered into a Buying Agency and Supply Agreement with Wise's company, Forward China, which provided that Forward China would act as Plaintiff's exclusive buying agent and supplier of products in the Asia-Pacific Region. (*Id.* ¶ 17.)

While Forward historically made purchases directly from its suppliers, beginning in September 2013 the Company began making purchases directly from Wise's company, Forward China. Forward has publicly stated that it anticipates that at some point in 2014, substantially all purchases will be made directly from Forward China. (*Id.* ¶18.)

C. Defendant Wise Acquires Forward Common Stock and Joins the Board

Wise's company is Forward's exclusive supplier Wise is the Company's largest shareholder. In December 2011, he purchased an aggregate of 1,076,808 shares of Forward common stock in a private transaction, away from the public market. In October 2012, Wise acquired an additional 506,733 shares (pursuant to a put option that was a feature of his December 2011 purchase), bringing his total share ownership at that time to 1,583,541 shares, or 19.66% of the then outstanding common stock of the Company. Shortly after acquiring his Forward stock, in February 2012, Wise became a Director of the Company. (Compl. ¶¶ 19-21.)

D. The Defendants' Knowledge of Confidential Company Information

As the respective principal and Managing Director of Forward China, Wise and Yu each are intimately aware of material nonpublic information about the Company's operations, including critical information about the cost structure and order flow for the vast majority of the Company's products. In addition, Wise has been privy to much of the Company's most sensitive information since he became a Director in February 2012. In that capacity, he attended Board meetings, in Manhattan and via teleconference, and received market-sensitive materials prior to participating in such meetings. (Compl. ¶¶ 22-23.)

In 2012, Wise proposed that Yu also join the Board. While Yu already was known to Forward as Wise's long-time business partner and as Managing Director of Forward China, the Company did not agree to Wise's request. Wise then proposed that Yu be permitted to attend Board meetings, and in light of Yu's significant role within Forward China, the Company acquiesced to Wise's request. Yu attended Board meetings at the offices of the Company's counsel in Manhattan during 2012 and 2013 at which confidential and market-sensitive information was discussed, including information about earnings, earnings projections and other material information about the Company's operations. In addition, during at least one Board meeting Yu was expressly made aware of the Company's Insider Trading Policy, which provides that employees of Forward's Board members may not trade Forward securities during "black-out" periods and whenever they are in the possession of material non-public information. This Policy applies to Yu as Managing Director of Wise's company Forward China. (Compl. ¶¶ 24-27.)

E. Defendants File False and Misleading Schedules 13D

Defendants have failed to comply with Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder. Wise filed a Schedule 13D in December 2011 (the "Wise Initial 13D"), upon his initial acquisition of Forward common stock, and filed Amendment No. 1 to the Wise Initial 13D in October 2012, upon his acquisition of the additional shares. As set forth therein, as of October 2012 Wise's 1,583,541 shares, plus an immediately exercisable option to purchase an additional 10,000 shares, represented 19.66% of the then outstanding common stock of the Company. (Compl. ¶¶ 28-31 & Udell Decl. Exs. 2-3.) As of that point in time, Wise had thus approached the maximum number of shares he could acquire *without* triggering the restrictions of New York Business Corporation Law Section 912, which, among other things, prohibits the owners of twenty percent or more of a corporation's outstanding common stock from entering into any "business combination" with the Company for five years, absent Board approval.

On April 22, 2013, Yu filed a Schedule 13D with the United States Securities and Exchange Commission (the "SEC"), indicating that she was the beneficial owner of 444,217 shares of Forward common stock, representing 5.48% of the then outstanding common stock of the Company. In her Schedule 13D, Yu identified herself as "Managing Director" of Forward China, noted that it was "an entity that is wholly-owned by Terence Bernard Wise" and claimed that she had "no understandings, arrangements, relationships or contracts relating to" Forward common stock. (Udell Decl. Exs. 15-16.)

By letter dated April 23, 2013, Forward's outside counsel notified Yu that her Schedule 13D was deficient in various ways, among them, for failure to identify each of the purchases made by her within the prior 60 days, as required by Item 5(c). In addition, counsel noted its belief that Yu may be part of a "group" with Wise, within the meaning of the federal securities laws, and that, if so, her filing should be amended to reflect that fact. (King Decl. ¶ 6.)

On April 26, 2013, the Forward Board (including Defendant Wise) met telephonically to address the filing of Yu's Schedule 13D. At that meeting, Wise was asked about Yu's Schedule 13D filing, and he contended that he was not part of a group with Yu. Wise claimed that Yu had acted independently with her own funds and that she just wanted to invest in the Company. Wise also stated unequivocally that he had no intention of trying to take over the Company, and that he was not planning anything with respect to the Company. (King Decl. ¶ 7.) At the same Board meeting, the Board passed (with Wise abstaining from voting) a shareholder rights plan (the "Rights Plan") which, in substance, would be triggered if any shareholder or group acquired beneficial ownership of twenty percent of the Company, and would, if triggered, operate to severely dilute the ownership of such shareholder. (*Id.* ¶ 8.)

Also at the April 26, 2013 Board meeting, a Special Committee was formed (the "2013 Special Committee"), consisting of Directors Owen P.J. King, Timothy Gordon and John Chiste. The 2013 Special Committee was authorized to investigate, analyze and report about the consequences flowing from the filing of Yu's Schedule 13D, and to consider any actions to take on behalf of the Company. (King Decl. ¶ 9 (setting forth text of the resolutions creating and empowering the 2013 Special Committee).)

Via email dated April 29, 2013, Yu responded to the Company's April 23, 2013 letter by expressly denying that she was a part of any "group" with Wise or anyone else for purposes of Rule 13d-5(b)(1). She also acknowledged that she would amend her Schedule 13D to add the required accounting of shares purchased within the prior 60 days, and listed the details of those purchases in her email. (King Decl. ¶ 10.) Thereafter, Yu filed an Amended Schedule 13D setting forth the details of her acquisition of 338,748 shares of Forward common stock (approximately 75% of her total of 444,217 shares) in multiple trades between February 19, 2013 and April 15, 2013. (*Id.* ¶ 11; *see also* Udell Decl. Ex. 16.)[1]

The 2013 Special Committee met on several occasions. Although skeptical of the professed denials of Wise and Yu, the 2013 Special Committee ultimately determined that it would not be a prudent use of the Company's resources to elevate its suspicions into a costly litigation with Wise and Yu, which the Committee also considered could disrupt the Company's business, as Wise and Yu controlled the Company's exclusive source of supply. In making that decision, among other things, the 2013 Special Committee relied upon the fact that there were no overt actions then being taken by Wise or Yu to affect corporate control or policy. In addition, the 2013 Special Committee understood that the newly adopted Rights Plan would offer protections in the event of any joint activity by Wise and Yu. Committee member Owen King additionally believed that it would be appropriate to give fellow Director Wise an opportunity to

[1] In her email dated April 29, 2013, Yu provided the details of one trade that she did not include on her Amended Schedule 13D, in which she purchased 8,194 shares of Forward stock on February 5, 2014. (*See* Compl. ¶35.)

demonstrate his good faith. (King Decl. ¶ 12.) The decision not to commence litigation or take other hostile action with respect to Wise's and Yu's status was never intended to act as approval or acceptance of their self-serving denials of group status, but was an exercise of the Committee's collective business judgment based on the facts and circumstances then known to them. (*Id.* ¶ 13.)

F. Wise Files False and Misleading Nomination Letters and Proxy Materials

The reliance placed by the 2013 Special Committee, and ultimately the Company, upon Wise and Yu's self-serving claims proved short lived. In fact, Wise's more recent conduct utterly undermines his earlier statements, set forth above, to the effect that he had no intention of trying to take over the Company, and that he was not planning anything with respect to the Company. (King Decl. ¶ 14.)

On June 6, 2014, Wise wrote a letter to the Board (the "First Nomination") declaring his intention to file proxy materials to solicit votes for the election of himself and three others as directors on the seven-member Forward Board. (Udell Decl. Ex. 13.) On June 26, 2014, in yet another letter (the "Second Nomination"), Wise changed course and declared that he intended to nominate a full slate of seven directors. (Udell Decl. Ex. 14.) If elected, Wise's hand-picked slate would take complete control of the Company's Board.

Wise's current actions—when coupled with Yu's conduct and each of their conclusory denials of coordinated activity and a desire to control the Company—make apparent that, in reality, Wise has had an express or at least an implied understanding with Yu concerning how they would vote their Forward shares and manage their collective investment. Yu and Wise are long-term business partners who have participated in many ventures for many years in various capacities and have had several pooled investments together. As one example, Yu served from 1995 through 2004 as a director of Justwise Group Limited, an entity founded by Wise of which he serves as Principal and Chairman. (Udell Decl. ¶ 18 and Exs. 17 & 8.) Yu is currently Managing Director of Wise's company, Forward China, the Company's exclusive supplier. Wise recommended Yu to serve on the Board and, failing that, invited Yu to attend Board meetings with him, which she did. Though he at first denied any intention of controlling the Company, Wise has now reneged on those affirmations. It is now more than apparent that Wise and Yu have a common understanding, arrangement, relationship or contract of the kind that must be disclosed on Schedule 13D. For these reasons, Yu violated Section 13(d) and the rules thereunder when she filed her Schedule 13D; similarly, Wise violated the same statute and rules by failing to amend his own Schedule to reflect his group arrangement with Yu.

While the Company has not yet set a date for its 2014 Annual Meeting, each of the past two such meetings have been held in September. (Compl. ¶¶ 39.)

Each of Wise's Nominations failed to disclose: (i) that Wise and Yu were members of a "group" within the meaning of the securities laws, due to their arrangement and understanding with respect to securities of the Company; and (ii) that Wise is deemed also to beneficially own the shares owned by Defendant Yu. These material deficiencies render Wise's Nomination letters invalid, pursuant to both Section 14(a) of the Exchange Act and the Company's Bylaws, which require a shareholder's nomination to disclose all information relating to each nominee that is required to be disclosed in a proxy statement. (Compl. ¶ 40 & Ex. A.)

As of the filing of the Complaint, Wise had made four filings under Schedule 14A: (1) June 6, 2014 – Information about his First Nomination; (2) June 20, 2014 – A press release regarding his First Nomination; (3) June 26, 2014 – Information about his Second Nomination; and (4) July 1, 2014 – A press release containing grievances. (Compl. ¶ 43; Udell Decl. ¶¶ 9-12 & Exs. 8-11.) He has since made an additional Section 14A filing on July 17, 2014, attaching a lawsuit he filed against the Company and five directors, alleging breaches of fiduciary duties. (Udell Decl. ¶ 13 & Ex. 12.) In each of the filings, Wise alleges that he is the beneficial owner of 19.6% of the outstanding shares of the Company. Each filing is false and misleading, as Wise discloses neither: (i) that he and Yu are members of a "group" within the meaning of the securities laws, due to their arrangement and understanding with respect to securities of the Company; nor (ii) that he (*i.e.*, Wise) is deemed also to beneficially own the shares owned by Defendant Yu. (Compl. ¶¶ 43-44 & Udell Decl. Exs. 6-12.)

Argument

This Court should grant Forward's motion for a preliminary injunctive relief to prevent Defendants from benefiting from their continuing violations of the federal securities laws in their efforts to take over the Company. Defendants should be enjoined from continuing and further violations of Sections 13(d) and 14(a) of the Exchange Act, and the rules promulgated thereunder. (*See* Point I.) Forward should also be entitled to conduct particularized expedited discovery in advance of the hearing on its motion for a preliminary injunction. (*See* Point II.)

I

FORWARD MEETS THE STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF AGAINST DEFENDANTS' VIOLATIONS OF THE SECURITIES LAWS

A party seeking a preliminary injunction must demonstrate:

> [(a) I]rreparable harm [in the absence of the injunction] and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and [(c)] a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Citigroup Global Markets, Inc., v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010) (citing *Jackson Dairy Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979)). Where the balance of hardships tips "decidedly" in favor of the movant, a demonstration of a likelihood of success on the merits is not required; it is sufficient to raise "serious questions going to the merits sufficient to make them a fair ground for litigation." *Hanson Trust PLC, HSCM v. ML SCM Acquisition Inc., ML L.B.O.*, 781 F.2d 264, 283 (2d Cir. 1986). The "serious questions" standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction. *Citigroup Global*, 598 F.3d at 35; (citing *F. M Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F. 2d 814, 815-19 (2d Cir. 1979)).

Here, the Court can both "determine with certainty" that Forward will prevail on the claims for relief pleaded in the Complaint, *id.*, and be assured that Forward's claims are sufficiently serious to meet the standard for injunctive and declaratory relief. A preliminary injunction is especially appropriate where the defendant has failed to make required disclosures and corporate control is at stake. *See, e.g.*, *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d Cir. 1989) ("Erring on the side of granting the injunction becomes especially imperative in corporate control contests because once the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to unscramble the eggs."); *see also Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 846, 851 (3d Cir. 1973) (injunctive relief particularly appropriate in proxy fights and other corporate control contests) (quoting *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247, 250 (2d Cir. 1973) (target corporation entitled to preliminary injunction for the failure to "adequately disclose material information")); *American Insured Mortgage Investors v. CRI, Inc.*, Nos. 90 Civ. 6630, 6716, 1990 WL 192561, at *6 (S.D.N.Y. Nov. 26, 1990) (any "[d]oubts as to whether a preliminary injunction is necessary to safeguard the public interest protected by the securities laws should be resolved in favor of granting the injunction.").

A. Forward Likely Will Succeed on the Merits of Its Section 13(d) Claims Against Defendants

Forward likely will succeed on the merits of its Section 13(d) claims against Defendants because Defendants have failed to disclose their group status and agreements on their Schedule 13D filings. Section 13(d) was added to the Exchange Act by the Williams Act of 1968. "The legislative history shows that the purpose of the Williams Act was to close a gap in the disclosure requirements of existing securities laws by requiring full disclosure by persons or groups who 'purchase by direct acquisition or by tender offers...substantial blocks of the securities of publicly held companies.'" *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 102 (7th Cir. 1970) (*quoting* 113 Cong. Rec. 24664 (1967)). "[The] purpose [of Section 13(d) is] 'to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control.'" *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 122-23 (2d Cir. 2001) (*quoting GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971)); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (Williams Act largely remedial in nature, to be broadly construed to give effect to its intent to protect investors, the markets, and the public generally through full disclosure).

Specifically, "[Section] 13(d) requires any person [or group] acquiring beneficial ownership of five percent or more of a corporation's common stock to disclose *within ten days* of the acquisition certain information to the corporation, the Commission, and the exchanges on which the stock is traded." *Morales*, 249 F.3d at 123 (*citing* 15 U.S.C. § 78m(d)(1)(D)); *see also* 17 C.F.R. § 240.13d-101. In addition, if two or more persons reach an understanding to work together "for purposes of acquiring, holding, voting or disposing of equity securities," they must, under Rule 13d-5, file a Schedule 13D within 10 days of when the group's aggregate holdings reach five percent. This obligation reflects Congressional recognition that fair and full disclosure is fundamental in matters of corporate control. *See GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971). Finally, any changes to the material contents of the Schedule 13D—such as a change in beneficial ownership by one percent or more of the issuer's securities—must be corrected promptly through an amendment. 17 C.F.R. § 240.13d-2(a).

Here, Defendants have consistently failed to disclose that they are part of a "group." (Compl. ¶¶ 28-37 & Udell Decl. ¶¶ 3-8; 16-14 & Exs. 2-7, 15-16.) In applying Section 13(d), courts have found that a Section 13(d) "group" is formed whenever there is an agreement to act together in furtherance of a common objective. *Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir. 1982). Accordingly, as soon as a "group" beneficially owns more than five percent of a company's voting securities, it must make that disclosure in a Schedule 13D filing.

Circumstantial evidence supporting the inference of a formal or informal understanding between the defendants for the purpose of acquiring, holding, or disposing of securities is sufficient to establish the existence of a group. *See S.E.C. v. Savoy Indus., Inc.*, 587 F.2d 1149, 1162 (D.C. Cir. 1978). "A 'group' under [Section] 13(d)…need not be committed to acquiring, holding, voting, or disposing of securities on a specific set of terms. All that is required is that the members of the group have combined to further a common objective with regard to one of those activities." *Morales v. Freund*, 163 F.3d 763, 767 (2d Cir. 1999).

Such agreement or understanding need not be in writing. *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 617 (2d Cir. 2002); *see also Morales v. Quintel Entertainment Inc.*, 249 F.3d 115, 123-24 (2d Cir. 2001) (key issue is whether the individuals coordinated their actions for the purpose of acquiring, holding, voting, or disposing of securities); *Morales v. Freund*, 163 F.3d 763, 767 (2d Cir. 1999) (voting agreement entered into by shareholders with a third party that called for an effort to obtain voting control of the issuer's common stock, if it would help protect their interests, was sufficient evidence of a group); *Wellman*, 682 F.2d at 363 ("The touchstone of a group within the meaning of Section 13(d) is that the members combined in furtherance of a common objective … the concerted action of the group's members need not be expressly memorialized in writing."). Rather, the existence of a group may be inferred in the absence of an express or written agreement, where, as here, evidence demonstrates that group members were acting in furtherance of a common plan, goal, or purpose. *See Savoy*, 587 F.2d. at 1162-63; *Wellman*, 682 F.2d at 363-64 (finding a common plan among group members where recently removed chairman retained investment banks to seek out others who would participate in control transaction); *Champion Parts Rebldrs., Inc. v. Cormier Corp.*, 661 F. Supp. 825, 850 (N.D. Ill. 1987) (evidence of "common plan and goal" of seizing control where brokers enlisted investors to acquire undervalued company).

Here, the existing evidence—prior to discovery—demonstrates that Wise and Yu are acting in concert in furtherance of their joint goal to gain control over Forward by replacing the Company's entire existing Board of Directors with a slate nominated by Wise. As alleged in the Verified Complaint, Yu had an express or at least an implied understanding with Wise regarding how they would vote their Forward shares and manage their investment. Yu and Wise are long-term business partners and have participated together previously in joint ventures and investments. Yu is Managing Director of Wise's company, Forward China, the Company's primary supplier. Wise has recommended Yu to serve on the Board and, failing that, invited Yu to attend Board meetings with him. A mere several months after Wise acquired 19.66% of the Company and was effectively prevented from acquiring significant additional Forward shares—

without triggering the restrictions of New York Business Corporation Law Section 912 (discussed in Point I(C), *infra*) —Wise's partner, employee and Board-nominee Yu acquired 5.48% of the Company, thus doing indirectly what Wise was prevented from doing directly.

Under these circumstances, it is overwhelmingly apparent that Wise and Yu have a common understanding, arrangement, relationship or contract of the kind that must be disclosed on Schedule 13D. Neither Wise nor Yu have further amended their respective Schedule 13D filings to disclose their status as a group or any understandings or arrangements they have with respect to their Forward shares. (Compl. ¶¶ 28-37.)

Defendants' status as a group is both evident and circumstantially supported, and their failure to disclose that status is materially misleading and in violation of Section 13(d) and the rules promulgated thereunder. Forward has a strong likelihood of success on the merits of its Section 13(d) claims, which claims also raise issues that are sufficiently serious to warrant preliminary injunctive relief.

B. Forward Likely Will Succeed on the Merits of Its Section 14(a) Claims Against Wise

Forward also will likely succeed on the merits of its claims against Defendants because the proxy materials Wise filed plainly violate Section 14(a) of the Exchange Act[2] and Rule 14a-9 promulgated thereunder, which seek to prevent management or others from obtaining

[2] Section 14(a) makes it "unlawful for any person … in contravention of such rules and regulations as the Commission may prescribe … to solicit … any proxy or authorization in respect of any security …" 15 U.S.C. § 78n(a) (2014). The SEC has set forth the required contents of a proxy statement in Schedule 14A, 17 C.F.R. § 240.14a-101 *et seq*. (2014). In addition, Rule 14a-9 provides that "no solicitation … shall be made by means of any proxy statement … or other communication … [which] is false or misleading with respect to any material fact or which omits to state any material fact necessary to make the statement therein not false or misleading…." 17 C.F.R. § 240.14a-9 (2014).

authorization for corporate actions by means of deceptive or inadequate disclosures in proxy solicitations. *See Shaev v. Saper*, 320 F.3d 373, 379 (3d Cir. 2003).

Section 14(a) of the Exchange Act provides the SEC with the authority to regulate proxy solicitations. *See* 15 U.S.C. § 78n(a). "'The purpose of [Section] 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.'" *Roosevelt v. E.I Du Pont de Nemours & Co.*, 958 F.2d 416, 421 (D.C. Cir. 1992) (quoting *J.I Case Co. v. Borak*, 377 U.S. 426, 431 (1964)).

A claim under Section 14(a) is established where, as here: (i) proxy materials contain false or misleading statements of material facts or omit to state material facts necessary in order to make the statements not false or misleading; (ii) the misstatement or omission of material facts was the result of knowing, reckless or negligent conduct; and (iii) the proxy solicitation was an essential link in effecting the proposed corporate action. *See id.*; *see also General Elec. Co. By Levit v. Catchart*, 980 F.2d 927, 932 (3d Cir. 1992); *Wilson v. Great Am. Indus., Inc.*, 855 F.2d 987, 995 (2d Cir. 1988); *Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650, 653-54 (2d Cir. 1979) (omissions in Section 14(a) context material where "'substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote'") (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *Tiberius Capital, LLC v. PetroSearch Energy Corp.*, No. 09 CV 10270 (GBD), 2011 WL 1334839, at *7 (S.D.N.Y. Mar. 31, 2011) (citation omitted) (same). Forward satisfies each of these elements.

Where a proxy contest is the backdrop of the litigation, courts generally hold that a proxy statement violates Section 14(a) if it misrepresents or omits information that "a reasonable shareholder would consider…important in deciding how to vote." *Tracinda Corp. v. Daimler Chrysler A.G.*, 502 F.3d 212, 228 (3d Cir. 2007); *Shaev*, 320 F.3d at 379. A fact is "material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act." *Hutchison v. Deutsche Bank Secs. Inc.*, 647 F.3d 479, 485 (2d Cir. 2011); *see also TSC Indus. Inc. v. Northway*, 426 U.S. 438, 449 (1976) (missing information materials where it "would have assumed actual significance in the deliberations of the reasonable shareholder ... [and] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."). Even contingent facts may alter the total mix of information available to an investor. *See Wilson*, 855 F.2d at 992 (finding violation of Section 14(a) where defendants failed to disclose contingent fact where there was "a reasonable likelihood of its future occurrence").

Wise has made five filings under Schedule 14A alleging that he is the beneficial owner of 19.6% of the Company's outstanding shares: (1) June 6, 2014 – Information about his First Nomination; (2) June 20, 2014 – A press release regarding his First Nomination; (3) June 26, 2014 – Information about his Second Nomination; (4) July 1, 2014 – A press release containing grievances; and (5) July 17, 2014 – Copy Wise's lawsuit against the Company and five directors (collectively, the "Proxy Materials"). (Compl. ¶¶ 38-44 & Udell Decl. Exs. 8-12.) Each of the Proxy Materials contains material, knowing and deliberate misrepresentations and/or omissions, including the failure to disclose either: (i) that Wise and Yu are members of a "group" within the meaning of the securities laws, due to their arrangement and understanding with respect to securities of the Company; or (ii) that Wise is deemed also to beneficially own the shares owned by Defendant Yu. Such information about the Company's largest shareholder is certainly material to Forward's shareholders in any electoral context.

It strains credulity to contend that Wise and Yu are not in agreement. Wise and Yu have an extensive history doing business together and past involvement with the Company. (Compl.

¶¶ 24, 34.) Yet despite these numerous connections, and the fact that Yu purchased her shares only after Wise ran up against the potential bar of New York's Business Corporation Law Section 912, Defendants fail to disclose any association between them. For all of the foregoing reasons, Forward has a strong likelihood of success on its Section 14(a) claims, which are also sufficiently serious to warrant the issuance of preliminary injunctive relief.

C. Forward Likely Will Succeed on the Merits of Its Declaratory Judgment Claims Against Defendants

Section 2201 of Title 28 of the United States Code provides:

> In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201 (2014). In its Verified Complaint, Forward seeks declaratory judgments that: (1) the nomination materials submitted by Wise are invalid under the Company's Bylaws; and (2) the Defendants are "interested shareholders" within the meaning of Section 912 of New York Business Corporation Law. (Compl. ¶¶ 60-80.) Forward is likely to succeed in obtaining each of these judgments.

First, the same omissions afflicting Wise's Schedule 14A filings also render Wise's Nominations deficient and void under the Company's applicable Third Amended and Restated Bylaws, which require that a shareholder's nomination disclose all information relating to each nominee that is required to be disclosed in a proxy statement under Section 14(a) of the Exchange Act. The Bylaws further provide that shareholders seeking to nominate directors must comply with certain advance notice requirements and contain information relating to the nominating shareholder and the nominees required under the advance notice requirements contained in the Bylaws:

> Such shareholder's notice shall set forth (a) as to each person whom the shareholder proposes to nominate for election or re-election as a director, all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the [Exchange Act] and Rule 14a-11 thereunder … and (c) as to the shareholder giving the notice and the beneficial owner, if any, on whose behalf the nomination or proposal is made, (i) the name and address of such shareholder, as they appear on the books of the Corporation, and of such beneficial owner, and (ii) the class and number of shares of the Corporation which are owned beneficially and of record by such shareholder and such beneficial owner and the length of time such shares were held.

(Compl. ¶ 65 & Ex. A (Bylaws, Article II, Section 208(a)(2)).) Accordingly, an initial nomination letter is required to include all information relating to each nominee that is required to be disclosed in a proxy statement under Section 14(a) and the Rules thereunder. Wise's Nominations are each deficient because they did not contain information relating to Wise that is required under the following two subsections of Item 5(b) of Schedule 14A:

> iv. State the amount of each class of securities of the registrant which the participant owns beneficially, directly or indirectly….
>
> viii. State whether or not the participant is, or was within the past year, a party to any contract, arrangements or understandings with any person with respect to any securities of the registrant, including, but not limited to joint ventures, loan or option arrangements, puts or calls, guarantees against loss or guarantees of profit, division of losses or profits, or the giving or withholding of proxies. If so, name the parties to such contracts, arrangements or understandings and give the details thereof.

As set forth in the Verified Complaint, Forward alleges that Defendants are members of an undisclosed "group" within the meaning of the securities laws, due to their group arrangement and understanding with respect to securities of the Company, and that Wise is deemed also to beneficially own the shares owned by Yu. (Compl. ¶¶ 46-50.) In the event that the Court finds that Wise and Yu are a group, then Forward should likewise be entitled to a declaratory judgment confirming that the Nominations are invalid and void under the Company's Bylaws.

Second, Defendants are prohibited from conducting any "business combination" involving Forward's shares, because they are "interested shareholders" pursuant to Section 912 of New York's Business Corporation Law ("BCL"). Section 912 prohibits an "interested shareholder" that acquires twenty percent or more of the voting stock of a New York corporation from effecting a "business combination" with that corporation for five years following the acquisition, unless the bidder has obtained prior board approval. An "interested shareholder" is defined in Section 912(a)(10), in relevant part, as any person who is "the beneficial owner, directly or indirectly, of twenty percent or more of the outstanding voting stock of such corporation." BCL § 912(a)(10). A "beneficial owner," in turn, is defined to include a person who "has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting … or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock." BCL § 912(a)(4).

As set forth in the Verified Complaint, Forward alleges that Defendants have an "agreement, arrangement or understanding" with respect to the acquiring, holding and voting of their shares of Forward common stock, and thus are each "interested shareholders" and "beneficial owners," within the meaning of Section 912, of all of the shares of Forward common stock that they own collectively and in the aggregate—approximately 25% of the outstanding Forward common stock. (Compl. ¶¶ 73-80.) Again, in the event that the Court finds that Wise and Yu are a group, then Forward should likewise be entitled to a declaratory judgment confirming that Defendants are subject to the restrictions of BCL Section 912.

D. Forward and Its Shareholders Will Suffer Irreparable Harm if an Injunction Is Not Granted

Forward's Motion seeks to protect the right of informed corporate suffrage. Absent injunctive relief, Forward and its shareholders will suffer irreparable harm.

Injunctive relief is the most appropriate remedy for violations of Section 13(d) and Section 14(a) of the federal proxy rules. *See, e.g., MONY Group., Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 148 (2d Cir. 2004); *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1064 (D. Del. 1982) (this Court has "broad discretionary power to remedy violations of the federal securities law, and if it finds that [an individual or group] violated Section 13(d) and that such violation caused ... irreparable harm, it has the power to fashion an equitable remedy designed to fit the injury, including disenfranchisement"). It is well established that "[i]rreparable injury results from the use of materially false and misleading proxies when the free exercise of shareholders' voting rights will be frustrated," and where, as here, "shareholders would [be] deprived of their statutory right to be free from deceptive proxy solicitations and their corresponding right to an informed vote." *Lichtenberg v. Besicorp Group, Inc.*, 43 F. Supp. 2d 376, 390-91 (S.D.N.Y. 1999) (finding irreparable harm supported granting of a preliminary injunction). Indeed, the Supreme Court has held that misleading proxy statements satisfy the irreparable injury element and are the type of harm that warrants a preliminary injunction. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 383 (1970) (use and solicitation which is materially misleading poses the kind of irreparable injury to stockholders which can justify injunctive relief prior to a shareholder's meeting); *see also Kaufman v. Cooper Companies, Inc.*, 719 F. Supp. 174, 185 (S.D.N.Y. 1989) (enjoining annual meeting of shareholders to prevent shareholder vote based upon misleading proxy statement).

The harm threatened to Forward and its shareholders outweighs the harm that a preliminary injunction would cause Defendants. Here, the injunction order will prevent confusion within the mix of information available to shareholders and will prevent the casting of votes obtained through false and misleading information and omissions. Any harm that may accrue to Defendants as a result of the preliminary injunction is at most a delay while their filings are scrutinized and corrected, and is far outweighed by the need to prevent voting decisions based on misinformation. If Defendants are permitted to solicit proxies absent corrective disclosures, Forward's shareholders will be forced to cast their votes without the benefit of appropriate disclosure concerning Wise and Yu's alliance as a group. That group affiliation is material information that would impact how a shareholder would vote: particularly in light of Defendants' status as Forward's exclusive sourcing agent, existing control of approximately 25% of the Company's outstanding shares, and recent efforts to nominate an entirely new Board hand-picked by Wise, a reasonable shareholder could conclude that Wise and Yu were planning significant changes for Forward. Monetary damages simply cannot compensate the Company or its shareholders for the harm that would result from a misinformed shareholder vote.

E. The Balance of Hardships Is Decidedly in Forward's Favor and Will Serve the Public Interest

Forward and its shareholders should not be required to vote without having access to material information required by Sections 13(d) and 14(a). The only possible injury to Defendants is a delay in their nominations to the Company's Board of Directors. That hardship is decidedly less severe than those to which Forward and its shareholders would be subjected if Defendants are able to elect their slate of nominees by unlawful means and without having made full and accurate disclosures to Forward, its shareholders and the market.

In weighing the harm of granting or denying an injunction in corporate control contests, courts have consistently favored taking preemptive action rather than trying to rectify the consequences at a later date. *See, e.g., Lone Star Steakhouse & Saloon, Inc. v. Adams*, 148 F. Supp. 2d 1141, 1150 (D. Kan. 2001). Indeed, it is preferable to resolve such disputes prior to events such as a shareholders meeting so as to avoid an "unscrambling of the eggs." *Medical Imaging Ctrs. of America v. Lichtenstein*, 917 F. Supp. 717, 720 (S.D. Cal. 1996) ("'in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, is the time when relief can best be given.'"); *see also Lewis v. General Employment Enterprises, Inc.*, No. 91 C 0291, 1991 WL 11383 at *3 (N.D. Ill. Jan. 21, 1991) (stating that while a vote can be undone, there is no need to do so when court can enjoin first).

Lone Star Steakhouse & Saloon, Inc. v. Adams, is instructive in this regard. 148 F. Supp. 2d 1141, 1143 (D. Kan. 2001). In *Lone Star*, the defendant sought a seat on the plaintiff's board of directors via a proxy contest. *Id.* at 1143. The court found that the defendant's proxy solicitation contained materially misleading misstatements and omissions regarding, among other things, the level of shareholder support that the defendant had garnered. *Id.* at 1152. In concluding that the balance of hardships clearly favored the plaintiff corporation, the court noted that the corporation was "subject to irreparable injury to its reputation and shareholder trust at a minimum, and may be subject to a major change in its Board of Directors based upon allegedly false and misleading information," while the defendant's hardship in preparing and filing a corrective disclosure was "minimal." *Id.* at 1150.

F. Forward Should Not Be Required to Post a Bond

Rule 65 provides, in relevant part, that no "preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper." Fed. R. Civ. P. 65(c). The Second Circuit and this Court has held that a District Court has discretion to dispense with any bond. *See International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974) ("[T]he district court may dispense with security when there has been no proof of likelihood of harm to the party enjoined."); *La Plaza Defense League v. Kemp*, 742 F. Supp. 792, 807, n.13 (S.D.N.Y. 1990) ("While Rule 65(c) appears to be mandatory, courts may decline to require the posting of a security bond."); 11A Wright, Miller and Kane, FEDERAL PRACTICE AND PROCEDURE, Sec. 2954 (1995 ed.) ("[I]t has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant.").

Here, there is no reasonable possibility that Defendants will suffer any monetary damages as a result of being enjoined and required to make remedial disclosures that comply with the securities laws. The Court, therefore, should dispense with the requirement of the bond.

II

FORWARD IS ENTITLED TO EXPEDITED DISCOVERY

Under Rule 26 of the Federal Rules of Civil Procedure, courts have broad discretion to permit expedited discovery. Courts have consistently recognized that expedited discovery is necessary and appropriate where, as here, violations of the federal securities laws are alleged and preliminary injunctive relief is sought.[3] In view of defendants' ongoing violations of the federal securities laws, as set forth in the Complaint, expedited discovery is warranted in this action to ensure a timely and just determination without which Forward and its shareholders will suffer severe prejudice. (*See* Udell Decl. ¶¶ 18-20.)

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[3] The Supreme Court has recognized that in contests for corporate control, "the stage of preliminary injunctive relief, rather than post contest lawsuits, 'is the time when relief can best be given.'" *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 42 (1977) (quoting *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969)). The preference of the federal courts for granting relief at the preliminary injunction stage mandates that evidence relating to plaintiffs' claims be expeditiously developed to the fullest extent possible. Following *Chris-Craft Industries*, courts routinely granted expedited discovery in cases where, against the background of a contest for Board positions or corporate control, plaintiff alleges ongoing violations of disclosure provisions of the federal securities laws. *See, e.g., Todd Shipyards Corp. v. Madison Fund, Inc.*, 547 F. Supp. 1383, 1384 (S.D.N.Y. 1982).

The Southern District uses two tests to determine whether to grant a request for expedited discovery: "reasonableness" and "good cause" shown. *See Stern v. Cosby*, 246 F.R.D. 453, 457 (S.D.N.Y. 2007); *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326-27 (S.D.N.Y. 2005); *see also Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982) (factors are irreparable injury, some probability of success on the merits, some connection between expedited discovery and avoidance of irreparable injury, and some evidence that injury resulting without expedited discovery [is] greater than injury to defendant if expedited relief is granted). Forward passes both tests.

Forward has established good cause for its Motion and request for expedited discovery—correction of false and misleading disclosures in advance of a shareholder vote (notably, no money damages are being sought)—and can establish each element of the test:

- *First*, expedited discovery is appropriate here because Defendants' on-going violations of federal securities laws, as set forth herein, threaten Forward's shareholders with imminent and irreparable harm.

- *Second*, expedited discovery also is appropriate because, while there is a likelihood of success on the merits of Forward's claims, Defendants are in unique possession of information concerning their coordination as a group and their plans to take over the Company. In order to garner information providing additional support for its claims, Forward must obtain immediate discovery from Defendants and third parties whom Defendants contacted in connection with their proxy materials and other SEC filings.

- *Third*, expedited discovery is appropriate because Forward is faced with harm that is both immediate and irreparable, in contrast to Defendants, and seeks discovery that is narrowly tailored in advance of preliminary injunction proceedings. (Udell Decl. ¶ 19 (seeking just two depositions and five targeted requests for documents within a compressed timeframe).

Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Court issue the preliminary injunctive relief and limited expedited discovery requested herein.

Dated: New York, New York
July 30, 2014

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